APPEAL NO. 93151

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. arts. 8308-1.01-11.10 (Vernon Supp. 1993) (1989 Act). A contested case hearing was held in (city), Texas, on December 16, 1992, before hearing officer (hearing officer). The appellant (hereafter carrier) appeals the hearing officer's decision that the claimant was injured in the course and scope of his employment. It contends that the hearing officer erred in finding that the claimant was provided a company vehicle for employer's convenience because the claimant was on 24-hour call; and in concluding that claimant's transportation to work was furnished as part of his contract of employment, that the means of such transportation was under the employer's control, and that therefore claimant was acting within the course and scope of his employment on (date of injury) when he was injured. The respondent (hereafter claimant) filed no response.

DECISION

We reverse the decision and order of the hearing officer and remand for further findings and conclusions regarding whether claimant was acting in the course and scope of his employment at the time his accident occurred.

The claimant was employed as an assistant shop foreman for Mr P and (employer). In that capacity, he was assigned a company vehicle which he was allowed to drive to and from work every day and to other places, such as to the field. He said the vehicle was only for company use, but that he drove it home when he was on 24-hour call. The truck assigned to the claimant was a special type of pickup, designed to carry pumps and a tool box. The claimant resided in Odessa, and employer's shop was just east of Midland. The travel time between the two was around 15 to 20 minutes.

The claimant testified that he was driving to work early (4:50 to 5:00 a.m.) the morning of (date of injury). He said he had made the decision the previous evening that he and other employees would get to work early the next day in order to repair several pumps before the usual workday started at 7:00. He said as he reached down to pick up the two-way radio to call one of the employees at the shop, a rollover accident occurred. The claimant apparently suffered broken ribs and a knee injury as a result.

The claimant said that many times he had gotten calls on the two-way radio as he was on his way to work, asking him to pick up parts and bring them to the shop. He said he was not on such an errand on the morning of the accident, although he said the reason he was calling in was to see if any runs needed to be made. In a written transcription of a telephone conversation between the claimant and carrier's adjuster, the claimant said he was reaching for the radio to call in to say he was running late when the accident occurred. The claimant testified at the hearing that he had just been released from the hospital on the day of the conversation and was in pain, as the transcription reflects.

Both the claimant and employer's comptroller, Mr B (who assisted the claimant at the

hearing), stated that the employer did not deduct any amounts from claimant's paycheck for use of the vehicle. Mr. B testified that at the end of the year the employer planned to initiate a new policy whereby it will reflect as income to each employee who uses a company vehicle an amount of money (representing $1.50 per trip) pursuant to the applicable Internal Revenue Service regulation on commuting mileage. However, Mr. B stated that the additional income will have an associated increase in federal taxes paid on behalf of the employee, with no net income tax effect on the employee.

Mr. B and the claimant testified that employer's policy was that the vehicle was not to be used for any personal purpose. Mr. B said that an employee could use a vehicle for personal use if he got prior clearance and reimbursed the employer for use of the vehicle; however, he also said that that had never occurred.

The hearing officer concluded that the claimant was commuting to work on (date of injury), but that the transportation was furnished as a part of claimant's contract of employment and the means of such transportation was under the control of the employer; therefore, the claimant was acting within the course and scope of his employment on (date of injury).

The carrier contends the hearing officer erred in reaching this conclusion because, it says, the conclusion implies that the mere fact that a claimant is furnished transportation as part of his employment, or that the means of such transportation is under the control of the employer, necessarily requires a finding that the claimant was acting within the course and scope of his employment.

The general rule in workers' compensation law has been that an injury occurring through the use of the public streets or highways in going to and returning from the place of employment is noncompensable because not incurred in the course and scope of employment. American General Insurance Company v. Coleman, 157 Tex. 377, 303 S.W.2d 370 (1957). The rationale behind this rule is that injury incurred in such travel does not arise out of the person's employment, but rather as a result of the dangers and risks to which all members of the traveling public are exposed. Janak v. Texas Employers' Insurance Association, 381 S.W.2d 176 (Tex. 1964).

However, there are several exceptions to this general rule, which are embodied in the applicable statute, Article 8308-1.03(12). The exceptions applicable to this case are contained in Section 1.03(12)(A)(i) and (ii), as follows: "The term [course and scope of employment] does not include:

(A)transportation to and from the place of employment unless:

(i)the transportation is furnished as a part of the contract of employment or is paid for

by the employer; [or]

(ii)the means of such transportation are under the control of the employer . . .[1]

The carrier argues that there is insufficient evidence to support the hearing officer's apparent conclusions that the vehicle was under the control of the employer at the time of the accident or to support the finding that the transportation was furnished as a part of the contract of employment. Even assuming these findings were correct, the carrier says, this does not automatically mean that an injury occurring during the travel is within the course and scope of employment. In this case, it argues, the claimant was not furthering the employer's interest by calling in on the radio, and the risk of an accident while turning on a radio is not inherent in this particular employer's business.

As the carrier contends, courts, in construing the prior statute, TEX. REV. CIV. STAT. ANN. art. 8309, Section 1b (repealed), (which contained the general rule and exceptions in substantially similar form as the current statute, *see* Texas Workers' Compensation Commission Appeal No. 91071, decided December 30, 1991) have held that the mere fact that the employee comes within one of the stated exceptions does not necessarily mean that injuries sustained during travel are in the course and scope of employment; it merely prevents the claim from being excluded from coverage simply because it was sustained while the employee was traveling to or from work. Rose v. Odiorne, 795 S.W.2d 210 (Civ. App.-Austin 1990, writ denied); Liberty Mutual Insurance Company v. Preston, 399 S.W.2d 367 (Tex. Civ. App.-San Antonio 1966, writ ref'd n.r.e.). Thus a claimant must first establish that he meets the requirements of one or more of the exceptions to the general rule, and thereafter show that the injury occurred within the course and scope of his employment. As the Supreme Court said in Texas General Indemnity Company v. Bottom, 365 S.W.2d 350 (Tex. 1963), with regard to the prior statute:

> When the provisions of Section 1B are read in connection with those of Section 1 and our decisions construing and applying the same, we think the Legislature intended thereby to circumscribe the probative effect that might be given to the means of transportation or the purpose of the journey rather than to enlarge the definition found in Section 1. The intention to authorize compensation for an injury received while the employee is permitted, solely for his own accommodation and not for any purpose connected with the employment, to ride in a vehicle owned and controlled by the employer, would have been expressed in clearer terms if that had been the legislative purpose. It is still necessary, therefore, for the claimant to show that the injury is of a

[1]We note that the facts of this case do not appear to bring into consideration other provisions of the statute such as the dual purpose test and the special mission exception.

kind and character that had to do with and originated in the work, business, trade or profession of his employer and was received while he was engaged in or about the furtherance of the affairs or business of the employer. *Id*. at 354.

We will first address the carrier's insufficient evidence points with regard to the two exceptions the hearing officer found to exist. Both the claimant and Mr. B testified that pursuant to a policy of the employer, the claimant was to have use of employer's vehicle when he was on 24-hour call. The claimant testified that he knew of no written agreement memorializing this agreement, but testified as follows: "That is the vehicle that was assigned to me. At the time of employment I was told that [employer] would furnish a pickup for me to drive to and from work and also to carry out business out in the field at the time that it's deemed necessary." In a signed transcription of a telephone conversation between Mr. B and carrier's adjuster, Mr. B stated, "[w]e have a written company policy that certain employees are provided a vehicle because they are on call . . . have to pick up . . . supplies, parts, whatever, pick up a pump, etc . . . so he's expected to, you know . . . if we were to call him or radio him, that he would . . . be expected to make a pick-up or delivery on his way to work. And in fact does that . . . It's for business use only. Like I said, we have a written policy, and they sign a statement that they . . . agree to adhere to our company policies."

Even though no written contract or policy was introduced into evidence, we have noted previously that such a contract may be oral. Texas Workers' Compensation Commission Appeal No. 92250, decided July 29, 1992, citing Liberty Mutual Ins. Co. v. Chestnut, 539 S.W.2d 924 (Tex. Civ. App.-El Paso 1976, writ ref'd n.r.e.). In this case we hold that there was sufficient evidence to support the hearing officer's conclusion that the transportation was furnished as part of claimant's contract of employment, either written or oral, or stated as a policy or a contract. Whether the relationship between the travel and the employment was a necessity from the employer's perspective and not just an accommodation, Rose v. Odiorne, *supra*, at 214, will be discussed further herein.

Fewer cases exist which construe the phrase "means of transportation . . . under the control of the employer." It has been held, however, that "by such control of the means of transportation the employer can avoid departure from direct or designated routes and in the exercise of his control he may avoid extra hazards." Republic Underwriters v. Terrell, 126 S.W.2d 752 (Tex. Civ. App.-Eastland 1939, no writ). The facts of this case appear to support the hearing officer's finding that the vehicle was under the employer's control. Both claimant and Mr. B testified that the vehicle was only for company use, and any deviations for personal use had to be cleared in advance. The presence of the two way radio, which claimant testified had frequently been used by the employer to direct him in his tasks, is further evidence of the control exercised by the employer. We find supported by sufficient evidence that portion of the hearing officer's conclusion of law stating that the means of transportation were under the control of the employer.

Turning to the issue of whether the claimant's injury arose in the course and scope of his employment, we reiterate our earlier statement that the employer's gratuitous furnishing of transportation as an accommodation to the worker and not as an integral part of the employment contract does not render compensable an injury occurring during such transportation; the employee still must prove he was acting in the course of his employment at the time. Rose v. Odiorne, *supra*; Texas Employers Insurance Association v. Byrd, 540 S.W.2d 460 (Civ. App.-El Paso 1976, writ ref'd n.r.e.); Texas Workers' Compensation Commission Appeal No. 92324, decided August 26, 1992, and Texas Workers' Compensation Commission Appeal No. 92716, decided February 16, 1993. We also note that courts have held that the fact that an employee was "on call" and could be called at any time is not controlling on the issue of compensability, *see* Loofbourow v. Texas Employers Insurance Association, 489 S.W.2d 456 (Civ. App.-Waco 1972, writ ref'd n.r.e.). The decision and order finds that the vehicle was furnished for employer's convenience; it also concludes that the transportation was furnished as part of claimant's contract of employment and that the means of such transportation was under the employer's control. It is not apparent from the decision and order, however, that the hearing officer actually made any findings or conclusions to support a determination that the injury occurred while the claimant was engaged in an activity in furtherance of the affairs of the employer and which was of a kind that originated in and had to do with the work of the employer. Article 8308-1.03(12). Because such a finding is essential to a holding of compensability in a transportation case, we are loathe to imply it from any finding or conclusion or from the decision and order as a whole. We therefore find it necessary to remand this case for further consideration of, and findings on, this issue.

The decision and order of the hearing officer is reversed and remanded for such further consideration and findings and conclusions are consistent with this opinion. Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's division of hearings, pursuant to Article 8308-5.41. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Philip F. O'Neill
Appeals Judge